P/OPINION 77-08

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April 4, 1977

Dear :

In your letter of December 8, 1975, you have requested rulings on behalf of (named) Local Pension Trust Fund and Health and Welfare Trust Fund (the Funds) as follows:

(1) Do the Funds have the authority to seek recoupment against those participants and beneficiaries who have been distributed a net overpayment of pension (or if such is the case, health and welfare) benefits?

(2) Assuming the authority to do so, must the Funds seek recoupment?

(3) Assuming the authority to do so and assuming that the Funds must seek recoupment, may the Funds recoup on a time payment basis, i.e., give the participant or beneficiary six, twelve, or longer months, depending on the amount involved, to repay the overpayment?

(4) Assuming the authority to do so and assuming that the Funds must seek recoupment, may the Funds withhold the amount of the recoupment (per month, as the case may be) from the amount of benefits distributed each month?

(5) What are the trustees' responsibilities to the public, as, for example, in advising other trust funds who employ the same plan administrator of the mistakes made in respect to these Funds so that the other funds can examine into their affairs to see if the plan administrator is performing according to contract standards?

You advise that on or about April 1973, the Funds engaged the services of (A), Inc., to perform, for the Funds, the various administrative functions of accounting for, keeping records of, and determining the benefits payable under the Pension Plan and Health and Welfare Plan. You understand that (B) is the successor in interest to (A), Inc.

You have submitted an undated and unsigned copy of Agreement Pertaining to Administrative Services, between (A), Inc., and the Pension Trust Fund, commencing May 1, 1973. This agreement indicates the relationship between the administrator, the trustees, and others: it shows that the administrator is an independent contractor; that the trustees have no liability for debts or obligations of the administrator; that the administrator is not liable for its acts or failure to act so long as its actions are in accordance with instructions of the trustees; that the administrator may arrange for data processing of Fund records with a local firm, subject to the trustees' approval; that the administrator will make appropriate retroactive adjustments based on the annual audit of the Fund by the Fund auditor; that the administrator agrees to provide annual actuarial and statistical data in accordance with the actuary's instructions; that the administrator shall attend meetings of the board of trustees; that the administrator shall be bonded as required by the trustees and Federal and (State) law; that the agreement may be terminated by either party upon written notice within a specified time; and that the agreement may be modified upon agreement of the parties. Exhibit A, attached to this agreement, lists the services to be provided by the administrator under the agreement. In addition to the services described in the preceding paragraph, Exhibit A shows that the administrator also processes applications for Fund benefits. You have also submitted a copy of a substantially similar agreement, dated April 3, 1974, and signed by representatives of both (A), Inc., and the Health and Welfare Trust Fund.

You believe that the administrator has been negligent in its administration of the Funds and that pension benefits have been computed incorrectly, resulting in a net overpayment of $21,936. You have submitted copies of (1) Pension Audit of (Local) Files since April 1973 through September 1975 Benefit Payments, showing underpayments and overpayments to 37 individuals in amounts ranging from $1 to $5,856 per person: (2) a letter dated January 21, 1975, to Mr. (X), Administrator of the Pension Trust Fund, from (Y}, of Company, Consultants and Actuaries,

itemizing alleged errors in employee census and work data; and (3) a letter dated November 7, 1975, to you from (Z), President of (B), the successor in interest to the administrator, presenting an offer of settlement. You state that the trustees of the Funds expect to commence a suit promptly against (B) seeking the full amount of the overpayments, including health and welfare benefits if errors are found in that account.

You explain that there are presently 130 participants receiving pension benefits from the Pension Fund, and an average of 409 participants enjoying health and welfare benefits. You believe that the average pensioner lives on his pension benefits (averaging $276.10 per month) and social security benefits and that recoupment of an overpayment of pension benefits will work a hardship.

Section 404(a)(1)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that, subject to certain sections not relevant to this case, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

With respect to the first two questions, we note that in accordance with section 404(a)(l)(B) of ERISA, a fiduciary must attempt, with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, to recover erroneous payments made from a plan. If the plan recovers the full amount of the erroneous payments from the administrator, whose alleged negligence caused the overpayments to be made, the plan need not, of course, consider recoupment of the overpayments from the plan participants and beneficiaries who received them. Depending on the facts and circumstances relating to each overpayment, it may be prudent, within the meaning of section 404(a)(1)(B), for the Fund that made the overpayment to recoup on a time payment basis, as indicated in question (3) above, or to withhold the amount of the recoupment from the amount of benefits distributed each month, as indicated in question (4) above. In this regard, payment of the erroneous amount to the participant or beneficiary may be viewed as an advance payment of benefits due him under the plan. We are not commenting on the issues of whether such

recovery would constitute a forfeiture for purposes of section 203(a) of ERISA and section 411(a) of the Internal Revenue Code of 1954, or would constitute an assignment or alienation for purposes of section 206(d) of ERISA and section 401(a)(13) of the Code, because these issues are within the primary jurisdiction of the Internal Revenue Service, from whom you have requested identical rulings.

In other cases, again depending on the facts and circumstances involved, the hardship to the participant or beneficiary resulting from such recovery or the cost to the Fund of collection efforts may be such that it would be prudent, within the meaning of section 404(a)(1)(B), for the Fund not to seek recovery from the participant or beneficiary of an overpayment made to him.

With respect to the fifth question, ERISA does not require the trustee of a plan to advise the public of mistakes made by a plan administrator so that other plans hiring the same administrator can examine their affairs to see if the administrator is performing according to contract standards. However, we appreciate your advising this Office of the errors you believe were made in this case.

Sincerely,